U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 02 February 2016

Case No.: 2014-AIR-00022

In the Matter of:

MARK ESTABROOK,
Complainant,

v.

FEDERAL EXPRESS CORPORATION,
Respondent.

ORDER FOLLOWING SECOND *IN CAMERA* REVIEW

This proceeding arises from a whistleblower-protection claim filed under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21").[1] AIR 21 prohibits retaliatory or discriminatory actions by covered employers against their employees who engage in activity protected by the Act.

On November 18, 2014, counsel for Mark Estabrook ("Complainant") submitted a Motion to Compel Requests for Admissions, Interrogatories, and Requests for Documents. After a December 18, 2014, conference call and further informal communication between the parties, Federal Express Corporation ("Respondent") provided the Complainant with a privilege log on January 15, 2015. Because discovery disputes were ongoing, the undersigned continued the hearing by Order dated February 2, 2015. The Respondent continued to provide supplemental responses to discovery requests until February 3, 2015. The Complainant submitted an Amended Motion to Compel Requests for Admissions, Interrogatories, and Requests for Documents on February 19, 2015. On March 26, 2015, the Complainant submitted a Motion for Partial Summary Decision. An additional conference call between the parties was held May 1, 2015, during which the parties outlined the remaining discovery disputes. The undersigned's May 28, 2015, *Order Regarding Discovery and Scheduling* directed the Respondent to produce the withheld documents listed on its first privilege log for *in camera* review.

On July 20, 2015, the undersigned issued an *Order Following In Camera Review* ordering the Respondent to supplement discovery with four documents previously withheld under privilege assertions. By correspondence filed on August 3, 2015, the Respondent purportedly supplemented its document production in accordance with the undersigned's *Order Following In Camera Review*. However, on July 27, 2015, counsel for the Complainant requested further action regarding his Amended Motion to Compel and the Respondent's

[1] 49 U.S.C. § 42121.

responses to one interrogatory and fifteen document requests.[2] On August 19, 2015, after reviewing the file, which revealed no additional privilege issues, the undersigned issued an *Order to Produce Documents or Show Cause* requiring Respondent to produce the requested discovery responses within ten days of the issuance of the Order or show good cause why it should not be required to do so. A conference call between the parties was held on August 28, 2015, and the Respondent was provided until September 7, 2015, to comply with the August 19, 2015, Order. The Respondent purportedly supplemented its document production in accordance with the undersigned's *Order to Produce Documents or Show Cause* on September 8, 2015.

After further discussions between the parties regarding the sufficiency of the September 8, 2015, responses, the Respondent submitted a supplemental response on September 25, 2015, which included 179 pages of documents and a second privilege log identifying twenty-one privileged documents. The Complainant contested the validity of the asserted privileges (notably attorney-client privilege) and requested that the Respondent produce the documents identified. In its Third Motion to Compel, the Complainant insisted that none of the twenty-one documents identified in the Respondent's privilege log may be considered privileged. (Third Motion to Compel at 9.) Specifically, the Complainant asserted that the Respondent waived any right to assert privilege due to (1) its failure to identify these documents for over a year past the original document request; and (2) its failure to show cause as required by the undersigned's August 19, 2015, Order. (*Id.*) The Respondent responded, arguing that there is nothing in the record to suggest it has waived attorney-client privilege on subsequent or supplemental document productions. (Response to Third Motion to Compel at 8-9.)

On December 23, 2015, I issued an *Order Denying Complainant's Third Motion to Compel and Second Notice to Produce Documents for In Camera Review*, and gave the Respondent until January 21, 2016, to produce the allegedly privileged documents for *in camera* review. On January 21, 2016, the Respondent filed a Memorandum of Law, Privilege Log and Designated Privileged Documents for In Camera Review ("January 2016 Memorandum"). Having extensively reviewed the withheld materials and the corresponding arguments of the parties, I will discuss the validity of the asserted privileges below.

DISCUSSION

The Complainant challenges the Respondent's designation of twenty-one e-mails as privileged. The Respondent alleges that most of the e-mails do not relate to the issues in this case, and those that do involve communications to or from the Respondent's legal department. (January 2016 Memorandum at 1-2.) Specifically, the Respondent asserts the following:

> Members of FedEx management routinely seek advice and counsel from members of the Labor Relations Group regarding the interpretation and application of the terms and conditions of the Collective Bargaining Agreement ("CBA") between FedEx and the Air Line Pilots Association. All of the designated emails and documents relate to advice sought or received from FedEx's Labor Relations attorneys regarding the application and interpretation of the CBA, or they reflect

[2] The Complainant moved to compel responses to interrogatory 7 and document requests 1, 6, 7, 8, 10, 11, 12, 13, 14, 17, 18, 19, 20, 23, and 27.

> attorney thoughts and impression when dealing with legal matters relating to this collectively bargained workforce.

(January 2016 Memorandum at 2.) Relying on the the attorney-client privilege and the attorney work product doctrine, the Respondent urges the undersigned to withhold the communications at issue in this *in camera* review.

The Respondent acknowledges that the party seeking privilege has the burden to show that the communications were received from a client and made in confidence, and that privilege has not been waived. (January 2016 Memorandum at 3.) Citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), the Respondent alleges the attorney-client privilege "is the oldest of the privileges for confidential communications known to the common law." (January 2016 Memorandum at 2.) The attorney work product doctrine is a distinct privilege, which, at its core, "shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system." *United States v. Nobles*, 422 U.S. 225, 238 (1975.)

Having reviewed all of the documents the Respondent submitted for *in camera* review, I agree with the Respondent and find that the vast majority are irrelevant to the facts, claims, or defenses at issue in the present case. Moreover, even assuming, *arguendo*, that the documents were relevant, I find that all of them are protected by either the attorney-client privilege or the attorney work product doctrine. The correspondence at issue pertains to risks of pending arbitration, legal proceedings unrelated to this case, confidential settlement agreements unrelated to this case, and attorneys' mental impressions regarding legal procedures and policies. Legal advice and strategy, attorneys' mental impressions regarding procedures and litigation risk, consultations from outside legal counsel, and/or legal interpretations relating to or prepared in anticipation of litigation are protected from disclosure. The Respondent summarized the qualifications of the individuals who were authors or recipients of, or who were copied on, all of the communications at issue in this *in camera* review. Consistent with the Respondent's assertions, every e-mail represents communication sent to or received from attorneys who work in the Respondent's Labor Relations Group, attorneys who work in other FedEx departments, senior level managers, and/or outside counsel, regarding issues pertaining to the attorneys' client, FedEx. Moreover, in instances where paralegals and legal assistants provided communication to or received communication from their client, I find they were operating as agents for the attorneys for whom they work. As the documents in dispute are communications among the Respondent's attorneys, their representatives, and their client, they are protected from disclosure.

Based on the foregoing, I find the communications the Respondent submitted for *in camera* review are protected from disclosure. Therefore, the Complainant's request for production is **DENIED**.

SO ORDERED.

Digitally signed by John P. Sellers III
DN: CN=John P. Sellers III, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=Cincinnati, S=OH, C=US
Location: Cincinnati OH

JOHN P. SELLERS, III
Administrative Law Judge